BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
	)	
AUSTIN MERRITT KOOBA, M.D.	)	Case No. 800-2014-007184
	)	
Physician's and Surgeon's Certificate No. A71262	)	OAH No. 2017050485
	)	
Respondent.	)	
	)	

DENIAL BY OPERATION OF LAW
PETITION FOR RECONSIDERATION

No action having been taken on the petition for reconsideration, filed by Candice Clipner, Esq., on behalf of Respondent, Austin Merritt Kooba, M.D., and the time for action having expired at 5 p.m. on February 16, 2018, the petition is deemed denied by operation of law.

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
	)	MBC No. 800-2014-007184
AUSTIN MERRITT KOOBA, M.D.	)	
	)	
Physician's and Surgeon's	)	**ORDER GRANTING STAY**
Certificate No. A71262	)	
	)	(Government Code Section 11521)
	)	
Respondent	)	

Candice Clipner, Esq. on behalf of respondent, Austin Merritt Kooba, M.D. has filed a Petition for Reconsideration and Request for Stay of execution of the Decision in this matter with an effective date of February 8, 2018, at 5 p.m.

Execution is stayed until February 16, 2018.

This stay is granted solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration.

DATED: February 2, 2018

Kimberly Kirchmeyer
Executive Director
Medical Board of California

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
AUSTIN MERRITT KOOBA, M.D.	)	Case No. 800-2014-007184
Physician's and Surgeon's Certificate No. A71262	)	OAH No. 2017050485
Respondent	)	

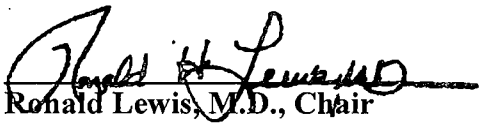
DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on February 8, 2018.

IT IS SO ORDERED January 9, 2018.

MEDICAL BOARD OF CALIFORNIA

By: 
Ronald Lewis, M.D., Chair
Panel A

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: AUSTIN MERRITT KOOBA, M.D., Physician's and Surgeon's Certificate No. A71262 Respondent.	Case No. 800-2014-007184 OAH No. 2017050485

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on October 2 through 6, 9, 13 and 16, 2017, in Oakland, California. The record was re-opened on November 16, 2017, and further hearing took place on December 4, 2017.

Deputy Attorney General Emily Brinkman represented complainant Kimberly Kirchmeyer, Executive Director of the Medical Board of California, Department of Consumer Affairs.

Candace Clipner and Michael Firestone, Attorneys at Law, represented respondent Austin Merritt Kooba, M.D., who was present throughout the administrative hearing.

The matter was submitted for decision on December 4, 2017.

FACTUAL FINDINGS

Introduction

1. Complainant Kimberly Kirchmeyer is the Executive Director of the Medical Board of California (Board), Department of Consumer Affairs. She brought the accusation solely in her official capacity.

2. On April 7, 2000, the Board issued Physician's and Surgeon's Certificate No. A71262 to Austin Merritt Kooba, M.D. (respondent).

3. The accusation alleges that respondent committed unprofessional conduct by: 1) engaging in sexual relationship with a patient; 2) terminating the patient-physician relationship in order to engage in a sexual relationship with a patient; 3) continuing to provide medical care to a patient after the relationship ended; 4) prescribing a medication, and backdating the medication, in order to induce an abortion; 5) practicing beyond the scope of his training and experience in providing the patient with bereavement counseling; and 6) demonstrating incompetence in his understanding of a prescription medication. The accusation also alleges that respondent violated Business and Professions Code sections 726 (sexual misconduct) and 729 (sexual exploitation).

4. The following factual findings were established by clear and convincing evidence and were based in part on the testimony of Patient A.[1] Patient A's testimony was credible, largely consistent over time, detailed and in accord with documentary evidence. Not all of the factual allegations made by Patient A or respondent are addressed in this proposed decision; however, they were considered, and either determined to be marginally relevant or not established by the evidence.

Respondent's Training and Employment History

5. Respondent earned a bachelor's degree in psychology from California State University Dominguez Hills/Long Beach in 1987. He earned a master's degree in behavioral science at California State University Dominguez Hills in 1989. Respondent held a marriage and family therapist intern license from January 23, 1990 until January 31, 1993.

6. Respondent attended the University of Colorado School of Medicine from 1992 to 1996. Following his graduation, he completed his internship and residency in obstetrics and gynecology at the Medical University of South Carolina from 1996 to 2000. Respondent became board certified in obstetrics and gynecology in 2003, and a fellow of the American College of Obstetrics and Gynecology in 2000.

7. In 2000, respondent was hired as a staff obstetrician and gynecologist (Ob/Gyn) by The Permanente Medical Group, Santa Rosa (TPMG). He received staff privileges at the Kaiser Foundation Hospital in Santa Rosa (Kaiser Santa Rosa) at that time.

8. In 2009, respondent accepted a leadership position at Kaiser Santa Rosa, serving as the Medical Director of the Labor and Delivery Unit. In July 2014, following an investigation into a relationship between respondent and Patient A, respondent was asked to resign from his position as Medical Director. After a subsequent investigation into the allegations contained in the accusation, respondent's privileges were revoked by Kaiser Santa Rosa and he is on unpaid administrative leave from TPMG.

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[1] Patient A's name is withheld to protect her privacy.

Respondent's Treatment of and Relationship with Patient A

9. Respondent became Patient A's Ob/Gyn on January 24, 2002. He was her obstetrician for over 10 years; he delivered two of her babies and was her obstetrician during a third pregnancy. Patient A has six children. While acting as her obstetrician, Patient A at times felt that respondent was flirting with her; Patient A's husband, mother and sister reported to her that they had noticed the behavior as well.

10. During the course of their physician-patient relationship, respondent encouraged Patient A to go to nursing school. Patient A followed his advice and graduated from the nursing program at Mendocino College in May 2009. Respondent recommended her and she obtained a preceptorship at Kaiser Santa Rosa in the Labor and Delivery Unit. Following her graduation, Kaiser was not hiring; on April 21, 2009, respondent wrote a letter of recommendation on her behalf for a position in labor and delivery at Sutter Lakeside Hospital in Lakeport, California. On December 6, 2010, Patient A was hired by Kaiser Santa Rosa. She began in the postpartum department; on April 10, 2011, Patient A transferred to the Labor and Delivery Unit.

11. After she was hired, Patient A and respondent worked alongside of each other at the hospital a few times per month. Patient A felt embarrassed by what she perceived to be special attention that respondent paid to her in front of other nurses. Although Patient A considered some of respondent's behavior to be inappropriate, she did not report it to her superiors.

BEREAVEMENT COUNSELING

12. In April 2012, Patient A had a foster child living in her home. The child was five and one-half months old and was the son of the former wife of Patient A's brother. Patient A had taken in the child when he was three weeks old and was beginning the process of adopting him. On April 13, 2012, the child died of sudden infant death syndrome. Patient A attempted to resuscitate him without success. Patient A was devastated by the loss and felt unable to return to work in labor and delivery; she did not feel emotionally capable of resuscitating infants at work, which she was required to do at times.

13. Patient A's supervisor referred her to the Employee Assistance Program (EAP) for counseling and took her off work for a period of time. Patient A attended a few counseling sessions through EAP, but continued to feel unable to return to work. She was considering transferring to a position in the operating room.

14. Patient A trusted respondent and spoke to him about the situation. Respondent discouraged her from leaving the Labor and Delivery Unit; he advised Patient A that he had a background in counseling and could help her. Beginning on April 24, 2012, Patient A met with respondent for counseling; she recalls that he advised her that he had a master's degree in psychology. Respondent denies this, but concedes that his master's degree in behavioral

science hangs in his office. Respondent took Patient A off work beginning on April 26, 2012. Respondent's April 24 visit note states:

> Recently had death of child at home, she was 1st responder for CPR. Having flashbacks and stress. Looking into options for counseling for other children. Works as RN L and D, not able to return to work. Off til 5-14, will have [telephone] or office visit, then and see if able to return.

15. On May 16, 2012, respondent documented a visit with Patient A for "Stress." He reported that Patient A was "Still having stress with family events of demise. Discussed coping mechanisms, has appointment in psych in June, will f/u in 2 weeks." On May 21, respondent completed a doctor's certificate to support disability benefits from the Employment Development Department; on the form, respondent identified acute stress as the condition and indicated that Patient A had been under his care for the condition since April 24, 2012.

16. On May 30, 2012, Patient A was seen on an urgent basis in the Kaiser Santa Rosa mental health department. She sought treatment for anxiety and trauma due to her foster child's death. The medical record indicates that Patient A had returned to work the previous week and was struggling; she had had a panic attack in the operating room. Timothy K. Carroll, Ph.D., recommended individual psychotherapy, a four-session group meeting on anxiety and a medical evaluation by Alicia Dueñas, M.D.

17. On the morning of May 31, 2012, Patient A saw Suzanne Eaves, Psy.D., for bereavement counseling. Dr. Dueñas wrote a letter placing Patient A on modified work with no direct patient care from May 31 to June 19, 2012. Patient A also saw respondent on May 31, 2012, for a counseling session. Respondent documented the diagnosis as "stress," and Patient A had been involved in an urgent patient care situation that had elevated her anxiety. He documented that her appointment in psychiatry had been uneventful and she would follow up with respondent the next week. Respondent issued a letter restricting Patient A from patient care until June 11, 2012.

18. On June 5, 2012, Patient A attended a group session led by Dr. Carroll, who diagnosed her with an anxiety disorder. She attended individual therapy with Dr. Eaves on June 7, 2012, followed later that day with an appointment with Dr. Dueñas. Dr. Dueñas found Patient A in need of bereavement counseling and stated that Dr. Dueñas would contact respondent regarding a sleep aid while breast feeding. Patient A saw respondent for bereavement counseling on June 7, 2012; he documented a "continued discussion of bereavement of son, and how events in her past have influenced those feelings." During the counseling, Patient A advised respondent that she had been the victim of sexual abuse as a child. Respondent provided Patient A with a prescription for Ambien.[2]

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[2] Ambien is the trade name for zolpidem tartrate. It is a dangerous drug as defined in Business and Professions Code section 4022 and a Schedule IV controlled substance as defined in Health and Safety Code section 11507, subdivision (d)(32).

19. Patient A attended a second group session on anxiety on June 12, 2012. She did not find the group sessions helpful and did not attend the final two sessions. Patient A cancelled further appointments in the mental health department on June 28, 2012.

20. On June 15, 2012, respondent documented an encounter with Patient A for "bereavement counseling, uncomplicated" and "stress," during which she "reflected on issues from last appointment." The plan was for Patient A to return in one week for follow-up.

21. Patient A saw respondent for bereavement counseling on June 21, 2012; respondent again documented that Patient A had reflected on issues from the previous appointment. On June 28, 2012, respondent saw Patient A for "grief" and "stress." She was directed to follow up in two to three weeks.

22. Patient A returned to see respondent on July 25, and August 3, 2012. The reason for the encounters was "anxiety" and "bereavement counseling." On August 15, 2012, Patient A was seen by respondent for "stress." He documented that she "reflected on issues" from the previous appointment. On September 12, 2012, respondent saw Patient A for "bereavement counseling." Respondent reported that Patient A had been able to return to work without restrictions as of September 4, 2012.

23. Patient A testified credibly that in addition to these 12 sessions, respondent saw her informally for approximately an additional eight sessions. Respondent made time to see her during his "administrative time." As the Medical Director, respondent had time set aside to work on administrative matters. Because Patient A was known to his staff, they would let him know if she was there and would usher her into his office without a formal appointment.

24. According to Patient A, respondent took approximately one hour with her during the counseling sessions. Patient A found respondent's counseling to be very helpful, especially in the beginning when it focused on her foster child's death. Later, respondent asked her about her childhood, sexual history and current sexual habits, which made her uneasy. Patient A also reports that respondent spoke of his sex life with his wife. Because Patient A was uncomfortable with these discussions, she stopped attending the sessions shortly after Christmas in 2012 or early 2013.

25. Cell phone records document that respondent and Patient A called and sent text messages to each other on their personal cell phones during this time. Calls and texts were often clustered around appointment dates.

26. On November 10, 2014, respondent advised an attorney for TPMG that he only saw Patient A two or three times before referring her to a psychologist for therapy. At his Board interview, respondent stated he recalled meeting Patient A briefly for check-ins about her work status four to five times.

27. At hearing, respondent testified that he saw Patient A very briefly during the 12 documented appointments and that many of the appointments were over the telephone.

Respondent denied offering counseling, providing counseling or stating that he was trained to provide counseling; rather he claims that he was simply helping a colleague with needed documentation to support work restrictions.

Respondent claims that he selected diagnoses from a drop down menu to support taking Patient A off work, or that his medical assistant prepopulated the diagnosis before the appointment. Respondent also claims that early on he referred Patient A to Kaiser's mental health department; however, there is no documentation of any such referral. To the contrary, the records indicate that Patient A self-referred and was seen in the mental health department over only a two-week period. Respondent's description of the care he provided to Patient A following the death of her foster child is at odds with the medical record documentation and was not persuasive.

THE MOME CONFERENCE AND A CHANGE IN THEIR RELATIONSHIP

28. On October 3 and 4, 2013, respondent, Patient A, and several other Kaiser Santa Rosa nurses and physicians attended Kaiser's Mobilizing for Maternity Excellence (MOME) conference at the Claremont Hotel in Oakland, California. Respondent was scheduled to speak at the conference. Patient A was attending as the co-chair of the Perinatal Patient Safety Committee at Kaiser Santa Rosa.

29. On the evening of October 3, 2013, respondent, Patient A and others went out for dinner, then met in the bar at the hotel for drinks. Patient A does not drink often and after a couple of drinks felt somewhat intoxicated. When she left, respondent followed her and convinced her to go to his room. They discussed disappointments in their marriages and respondent opened up to Patient A about his feelings for her and kissed her. Patient A felt confused; she trusted him and had been through a lot with the loss of her foster child. Patient A felt a closeness to respondent; he had helped her following that loss. She and respondent engaged in sexual conduct in his room that night. Respondent told Patient A that in light of the change in their relationship, she needed to find a new Ob/Gyn and she agreed.

Patient A left respondent's room in the early morning hours. She was rooming with two nurses who suspected that respondent and Patient A were beginning an affair. On the following Monday at work, when Patient A began asking about switching to a new physician, rumors of the affair circulated through the Labor and Delivery Unit. Patient A admitted the affair to one nurse whom she considered a confidant. As of October 28, 2013, Patient A was formally assigned a new Ob/Gyn.

30. Telephone and text records between January and September 2013 demonstrate that respondent and Patient A generally contacted one another several times per month. Between October 3 and October 28, 2013, they texted each other over 1,400 times, indicating a change in the relationship.

31. According to Patient A, she and respondent had sexual intercourse within a couple of weeks of the conference and continued to engage in sexual intercourse frequently.

They often engaged in sexual conduct in respondent's office and in the lower level of the hospital. Several text messages corroborate this testimony. On November 13, 2013, respondent sent Patient A a text message stating: "How about meet you in LL at 2?" On May 10, 2014, at 3:09 p.m., respondent texted: "What time u changing?" Patient A responded: "When I'm done." Respondent replied: "Want to meet in my office?" And, on May 11, 2014, Patient A texted: "We could always arrange a hug in the men's locker room or your down stairs office. I can't imagine going 60 hours without touching you." Respondent replied: "K We will figure something out We always do." In addition, a Kaiser manager later reported that during the time of the affair, respondent would sometimes be late returning from lunch and patients would be left waiting for up to one hour.

32. Patient A's husband moved out in the fall of 2013 and they divorced the following year.

33. In late 2013, another physician in the Labor and Delivery Unit, Brad Golditch, M.D., became aware of the affair and noticed the impact it was having on the unit. He reported it to the chief of the department, Richard Klekman, M.D., and in turn to the Human Resources department (HR). He also confronted both Patient A and respondent. Dr. Golditch testified in deposition that Patient A admitted that they were having an affair. He counseled her not to continue because he did not expect that respondent would leave his wife and children, and he anticipated that it would not end well for either of them. Patient A felt that respondent loved her and that they would have a future together. When Dr. Golditch confronted respondent, respondent denied the affair angrily and told him to mind his own business. As time went on, Dr. Golditch continued to complain to his Kaiser superiors and HR and to counsel Patient A.

34. A TPMG attorney reported that on November 10, 2014, respondent told him that he had only "made out with" Patient A while they were in his hotel room on the night of October 3, 2013. Respondent denies making this statement. Respondent later told a Kaiser HR representative that they first began a sexual relationship in November 2013. During his Board interview on May 4, 2016, respondent said the relationship did not become sexual until late December 2013 or early January 2014.

At hearing, respondent testified that in his hotel room on October 3, 2013, he and Patient A only talked and that she left at 2:00 a.m. He stated that he agreed that Patient A should find another Ob/Gyn because their relationship had become more personal, but denied that at that time he intended for it to become sexual. Respondent testified that he clearly recalled that they first had sexual relations on Thanksgiving weekend in 2013, following a seven-week courtship. Respondent's credibility regarding when he first engaged in sexual conduct with Patient A is undermined by the inconsistencies in his statements, the dramatic increase in their telephone and texting contacts following the conference, and by Patient A's credible testimony.

PATIENT A'S PREGNANCY

35. On February 20, 2014, Patient A took a home pregnancy test and discovered that she was pregnant with respondent's child. She told respondent the next morning, on February 21, 2014, while he was at work in the clinic. Respondent panicked and left work at noon without informing his medical assistants to cancel his appointments. He instructed Patient A to take her daughter to day care so that they could confirm the pregnancy and discuss the matter.

36. Patient A described in detail what occurred later that day and night. When they met, respondent was very upset. He told respondent that she needed to terminate the pregnancy in order to save their careers and their families. Respondent felt that he would lose his medical license if the affair were discovered. Respondent felt terminating the pregnancy was the only option.

37. Patient A did not want to terminate the pregnancy; she had never had an abortion and was against it. Respondent insisted that she be seen somewhere other than at Kaiser to confirm the pregnancy and that they discuss the options. He made an appointment for her at Planned Parenthood in Clearlake. They drove to Clearlake where they stopped at a pharmacy and she took another home pregnancy test. The test confirmed the pregnancy.

38. The pregnancy was confirmed by a urine test at Planned Parenthood. Patient A informed the Planned Parenthood medical assistant that she planned to terminate the pregnancy and denied being coerced into the decision. She received pamphlets and the deadlines for receiving an abortion. Patient A was confused and did not know what to do.

39. Patient A took an HCG test[3] at a Kaiser Santa Rosa lab later that day, at around 6:00 p.m. The test confirmed that her pregnancy and provided an indication of her due date.

40. Respondent and Patient A continued to debate whether to terminate the pregnancy into the evening. Respondent told Patient A that he had done some research online and was going to prescribe a medication for her that would terminate the pregnancy. He insisted that she fill the prescription and take the medication that night, stating that the sooner they took care of it the easier it would be.

41. On February 21, 2014, they went to respondent's office where he wrote a prescription for Misoprostol[4] and backdated it to January 5, 2014. They planned to fill the

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[3] A quantitative human chorionic gonadotropin (HCG) test measures the specific level of HCG in the blood from a hormone that is only produced during pregnancy.

[4] Misoprostol is the generic name for Cytotec. Its approved use is to reduce stomach acid and protect the stomach from damage while a patient takes a non-steroidal anti-inflammatory medication. Misoprostol can cause birth defects, premature birth, uterine rupture and miscarriage. It is commonly used in Ob/Gyn practices for many reasons including

prescription at Walgreens instead of Kaiser so that no one at Kaiser would find out about the abortion. Respondent drove Patient A to a 24-hour Walgreens. Respondent had told her that she needed to take four pills to terminate the pregnancy. Patient A entered the pharmacy while respondent waited outside; she decided to fill only eight pills instead of 30, because she did not have insurance to cover prescriptions filled at Walgreens (only at Kaiser). When she returned to the car, respondent was upset that she had only obtained eight pills and insisted that they obtain the balance of the prescription. When the balance of the prescription was filled, it was after midnight. They returned to the Kaiser parking lot where they continued to discuss the issue. Respondent was adamant that Patient A terminate the pregnancy. Finally, Patient A agreed to take the medication; she felt she needed to protect respondent, and she was concerned that if she refused she would suffer repercussions at work. She took four pills of Misoprostol in the car.

42. Respondent drove Patient A home sometime after midnight. He called Patient A at 1:13 a.m. and they spoke for 82 minutes. He called her again at 2:38 a.m., when they spoke for three minutes, then at 2:41 a.m., when they spoke for 16 minutes. Phone records indicate that respondent called Patient A another 18 times between 2:59 a.m. and 3:35 a.m. These calls went unanswered; Patient A was very distressed about taking the Misoprostol and wanted to be left alone. Respondent started calling Patient A again at 6:44 a.m.; at 7:17 a.m., Patient A spoke with him for 32 minutes, and again at 8:31 a.m., they spoke for 24 minutes.

43. Patient A had not started miscarrying by the next morning, February 22, so respondent instructed her to take four more Misoprostol pills vaginally. Patient A was still having difficulty with the idea of the abortion, but respondent convinced her that the baby was already damaged and she had to follow through. Patient A took four pills vaginally that afternoon and she began to miscarry the following day. A subsequent HCG test at Kaiser confirmed the miscarriage. Patient A suffered significant emotional distress over the loss of the pregnancy and began to question her relationship with respondent.

44. Respondent admits that he drove Patient A to Planned Parenthood in Clearlake. He states he did not know if he was the father and that Patient A wanted to have an abortion but did not want to go to Kaiser. Respondent testified that he waited for her in the car at Planned Parenthood and when she came out 45 minutes to an hour later she said it was all taken care of and he thought she had had an abortion. Respondent testified that afterward he dropped Patient A off and returned home to have dinner with his wife and children and watch television. This testimony contradicts his reported statement in an interview at Kaiser on July 25, 2014, that Patient A had informed him that she was going to use the Misoprostol he had prescribed for her in January to end the pregnancy.

45. With regard to the Misoprostol prescription, respondent admits that he wrote it and failed to document it in the medical record. However, he contends that he wrote it on January 5, 2014, for stomach protection while Patient A took ibuprofen for menstrual cramps.

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induction of labor, medication abortions, cervical ripening before surgical procedures and the treatment of postpartum hemorrhage.

In January 2014 respondent was experiencing frequent episodes of rectal bleeding and was very worried that he might have colon cancer. Respondent testified that he discussed his condition with Patient A during a visit on January 5, 2014, and that she asked him to make her the beneficiary on his life insurance policy, which he refused to do. Respondent testified further that during that conversation Patient A asked him for the prescription for Misoprostol and he felt it was the least he could do since he had refused to name her as a beneficiary on his life insurance policy. He claims that he advised Patient A not to use it if she were pregnant.

This testimony regarding life insurance and prescribing Misoprostol was not credible for several reasons. First, the statements he made about the discussion of his life insurance policy had never been made during previous interviews at Kaiser or with the Board. In addition, Patient A had seen her surgeon on January 2, 2014, and requested medication for pain following scar revision surgery on her abdomen. Her surgeon gave her a prescription for Lodine, a non-steroidal anti-inflammatory that is an alternative to ibuprofen; she filled the prescription on January 7, 2014. Therefore, Patient A was in possession of a prescription for a medication that is an alternative to ibuprofen at the time. Respondent claims, however, that Patient A did not want to drive 20 minutes to Kaiser to fill it. However, if Patient A had such an urgent need for the Misoprostol prescription, why would she wait to fill it until February 21?

46. Respondent's version of the events of February 21, 2014, was inconsistent, lacked detail and was not credible. During his testimony about the day's events, respondent did not exhibit the demeanor of someone who is telling the truth. Moreover, the telephone records document that respondent was calling Patient A throughout the night; this behavior was unusual and supports Patient A's testimony that he was panicked about the pregnancy and wanted to know whether she began to miscarry after taking the Misoprostol. Patient A's testimony was consistent with the objective evidence and rings true. Respondent's hearing testimony denying that he prescribed the Misoprostol on February 21 in order to induce an abortion is not credible.

THE END OF THE RELATIONSHIP

47. Respondent and Patient A continued to see each other and spent a weekend together at another conference at the Claremont Hotel, and later that spring, in Santa Cruz.

48. Dr. Golditch continued to have concerns about the impact of the affair on the Labor and Delivery Unit. He spoke up to management and to Patient A. Patient A, however, continued to envision a future with respondent.

49. In mid-May 2014, respondent's wife discovered the affair after reading text messages between respondent and Patient A. Respondent attended counseling with his wife and decided to focus on his children; the relationship between Patient A and respondent deteriorated. Patient A remained troubled by the abortion and continued to question the relationship. Respondent's wife was monitoring his text messages, so they could not communicate regularly. Respondent's marriage eventually ended in divorce.

In early June 2014, respondent's relationship with Patient A ended. Around that time, Patient A discovered she was pregnant again, which is documented in the Kaiser records. She suffered a spontaneous miscarriage shortly thereafter.

50. Around this time, Kaiser Santa Rosa was alerted about the relationship by a physician from another Kaiser facility and HR contacted Patient A for an interview; she sought advice from her union representative. At the same time, Patient A sought counseling from a psychologist at Kaiser Santa Rosa. Dr. Golditch recommended that she seek an attorney if she felt she had been victimized.

51. After reflecting on her conversations with her union representative and her psychologist, Patient A filed a complaint with Kaiser and with the Board. She came to feel that respondent had abused his position of trust with her and she did not want another woman to suffer the same fate.

Initial Kaiser Investigation

52. Patient A submitted a hotline compliance complaint to Kaiser Santa Rosa on June 13, 2014. The complaint triggered an investigation, but Patient A refused to be interviewed. She wanted to be represented by counsel and understood that Kaiser would not allow her to have an attorney present.

53. Respondent, Dr. Klekman and Dr. Golditch, were interviewed. During his interview, respondent stated that Patient A had sought a more personal relationship with him at the MOME conference. Respondent also stated that in early February 2014, Patient A asked him for a prescription for Misoprostol for menstrual cramps. He stated further that in late February or early March 2014 Patient A told him that she might be pregnant, but he did not know if it was true. He admitted accompanying Patient A to Planned Parenthood, and said that after the appointment she had told him she would use the Misoprostol to end the pregnancy. Respondent also stated that he broke off the relationship in early May and that she took it badly and sent him unwanted messages and texts, and that she thereafter demanded money from him and threatened him.

54. On July 25, 2014, based on the information available at that time, an HR manager concluded that respondent and Patient A had a consensual sexual relationship beginning in November 2013, after she changed her Ob/Gyn; that respondent had written a prescription for Patient A for Misoprostol that was not documented in the medical record; that it could not be substantiated that Patient A had become pregnant; and that the relationship was severed in May 2014. As a result of these actions, respondent had violated the Kaiser Principles of Responsibility (1.4.4 and .5 – be fair and honest and commitment to compliance and ethics, and 8.0 – avoid conflicts of interest), the Kaiser Santa Rosa Physician Code of Conduct Policy (incident of inappropriate conduct and behavior) and the conflict of interest provision in the Permanente Medical Group policy manual. Respondent was asked to resign from the position of Medical Director of the Labor and Delivery Unit.

55. On August 12, 2014, Dr. Klekman issued a Letter of Warning to respondent based upon the findings. Respondent was notified that in addition to losing the leadership position, he would not be eligible for salary adjustments. On November 14, 2014, respondent wrote a memorandum in response to the Letter of Warning. He requested a reversal of the decision to withhold his year-end bonus and argued that although the relationship with Patient A involved "bad personal judgment," he disagreed that it was in violation of any work policies, or warranted withholding his bonuses.

Patient A's Lawsuit

56. On October 10, 2014, Patient A filed a lawsuit against respondent, Kaiser Santa Rosa and TPMG. Patient A received a settlement in the amount of $200,000 on July 16, 2015. On September 16, 2015, Kaiser Santa Rosa filed a report of the settlement with the Board pursuant to Business and Professions Code section 801.01, subdivision (c).

Medical Board Complaint and Investigation

57. On July 25, 2014, Patient A filed a complaint with the Board alleging that respondent provided her with unlicensed mental health counseling, entered into a sexual relationship, impregnated her and then forced her to have an abortion. On December 19, 2014, Patient A was interviewed by an investigator, a physician and a deputy attorney general. Respondent was interviewed on May 4, 2016. The investigator obtained relevant medical records, telephone records, copies of depositions taken in the related civil case, and a CURES report.[5]

58. At his Board interview, respondent denied having assisted Patient A in obtaining a position at Kaiser. Respondent stated that after Patient A's foster child died he agreed to take her off work, saw her briefly for that purpose and coordinated her care with the mental health department; he did not recall how he coordinated care with the mental health department. Respondent recalled seeing Patient A for check-ins approximately five times during this period.

During his Board interview, respondent conceded that he had helped Patient A select a new physician after the MOME conference; he stated that they had discussed that if they ever wanted to get together, she needed to change physicians. Respondent denied that they kissed or were contemplating a relationship at that time.

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[5] Pursuant to Health and Safety Code section 11165, the Department of Justice maintains the Controlled Substance Utilization Review and Evaluation System (CURES) for the electronic monitoring of, and internet access to information regarding the prescribing and dispensing of Schedule II, Schedule III and Schedule IV controlled substances by all practitioners authorized to prescribe, order, administer, furnish, or dispense controlled substances.

Respondent denied being aware that Misoprostol could be used to terminate a pregnancy. He stated that he did not know what the outcome would be if a pregnant person took the drug; he agreed it was not safe with pregnancy but said he did not believe it would induce a miscarriage.

Respondent stated that he would do things differently in the future; namely, he would not have a relationship with a patient or coworker, he would document all prescriptions clearly and only write prescriptions for patients, and he would clearly and thoroughly document patient visits.

American College of Obstetricians and Gynecologists Code of Professional Ethics

59. The American College of Obstetricians and Gynecologists (ACOG) publishes a Code of Professional Ethics. Compliance with the Code is required for the continuing fellowship in ACOG.

The ACOG Ethical Foundations in the Code include the following: 1) the welfare of the patient is central to all considerations in the patient-physician relationship; 2) the Ob/Gyn must deal honestly with patients and colleagues, this includes not misrepresenting himself/herself through any form of communication in an untruthful, misleading or deceptive.

The ACOG Code of Conduct requires that the patient-physician relationship have an ethical basis and be built on trust and honesty. It states further that sexual misconduct on the part of the Ob/Gyn is an abuse of professional power and a violation of patient trust. The Code of Conduct provides: "Sexual contact or a romantic relationship between a physician and a current patient is always unethical." The Code of Conduct also requires that an Ob/Gyn obtain the informed consent of each patient. The Code of Conduct also provides that the Ob/Gyn should recognize the boundaries of his particular competencies and expertise and must provide only those services and use only those techniques for which he/she is qualified by education, training and experience. Finally, the Code of Conduct observes that the Ob/Gyn must not knowingly offer testimony that is false.

Expert Opinions of Dr. Phillips

60. Albert J. Phillips, M.D., testified as an expert witness on behalf of complainant. Dr. Phillips graduated from University of Southern California School of Medicine (USC) in 1981. He attended the obstetrics and gynecology residency program at Los Angeles County/USC Medical Center from 1981 to 1985. Dr. Phillips has been board certified in obstetrics and gynecology since 1987 and is a member of ACOG. He has been in private practice in Santa Monica, California, since 1985, specializing in obstetrics, gynecology and infertility. He has been the Medical Director of Women's Health Services at Providence Saint John's Health Center since 2012. Dr. Phillips was on the faculty at the USC Department of Obstetrics and Gynecology beginning in 1997; he left the position last year because the Department Chair no longer wanted outside clinical faculty. Dr. Phillips has reviewed cases

for the Board since 2006.

61. Dr. Phillips reviewed Patient A's complaint to the Board, her medical records from Kaiser and Planned Parenthood, her CURES report, respondent's cell phone records, text messages between respondent and Patient A, the transcript of respondent's Board interview, respondent's curriculum vitae, the transcript of Patient A's deposition, the deposition transcripts of various other Kaiser providers, Kaiser's final investigation report, respondent's Misoprostol prescription and documentation from Walgreens. He also reviewed the ACOG Ethical Guidelines and confirmed that his opinions were compatible with them. The testimony of Dr. Phillips was persuasive and uncontradicted.

62. Dr. Phillips noted that the sanctity of the physician-patient relationship must remain inviolate at all times. Patients should expect and demand that physicians treat them in a strictly professional manner commensurate with their training and experience. Sexual contact with a patient is never appropriate and undermines the sacred bond and must not be condoned or tolerated in any circumstance. Dr. Phillips opined that a sexual relationship with a patient is completely unethical and constitutes an extreme departure from the standard of care. Based on his years of experience, training and general knowledge, this is true whether the sexual conduct occurs during the physician-patient relationship or afterward. When boundaries between a patient and a physician break down, the patient loses trust in the physician; the patient must believe that the physician has his or her best interest in mind and has no alternative motivation. The physician must be separated emotionally and sexually from the patient in order to make objective decisions about the patient's care.

Patient-physician boundaries are taught in medical school and all physicians are aware that sexual contact with a patient is not appropriate and completely unethical. This is based on the Hippocratic Oath to never harm a patient; a sexual relationship with a patient will cause psychological damage to the patient. The only exception might be in the case of a physician who has not treated a patient for many years without any intervening contact. Waiting six weeks following the termination of a patient/physician relationship to begin a sexual relationship is highly improper.

Dr. Phillips opined that respondent's sexual relationship with Patient A constituted unprofessional conduct and an extreme departure from the standard of care. Their separate relationship as work colleagues does not change his professional obligations to Patient A.

63. Business and Professions Code section 726 prohibits a physician from engaging in a sexual relationship with a patient. Based on the evidence he reviewed, Dr. Phillips concluded that it was quite clear that respondent engaged in a sexual relationship with Patient A.

64. Dr. Phillips found that respondent's statement that he prescribed the Misoprostol to Patient A for gastric problems to be dishonest. He noted that the timing of the filled prescription coincided with the visit to Planned Parenthood and that her pregnancy was confirmed in various medical records. Dr. Phillips also opined that a competent Ob/Gyn

would know that Misoprostol causes uterine contractions and can facilitate an abortion; the medication is very commonly used by Ob/Gyn's.

Dr. Phillips opined that predating the Misoprostol prescription with the intent of disassociating it with Patient A's pregnancy also constituted unprofessional conduct and an extreme departure from the standard of care.

65. Dr. Phillips opined that writing the Misoprostol prescription after terminating the physician-patient relationship constituted unprofessional conduct and a simple departure from the standard of care.

66. Dr. Phillips also considered whether respondent engaged in sexual exploitation of Patient A. He explained that a physician may not terminate a patient-physician relationship for the primary purpose of engaging in sexual activity with the patient. Business and Professions Code section 729 provides the legal definition of sexual exploitation. It provides that absent an exception inapplicable here, a physician who engages in an act of sexual intercourse or sexual contact with a patient or former patient when the relationship was terminated primarily for the purpose of engaging in those acts, is guilty of sexual exploitation.

Dr. Phillips found that respondent and Patient A discontinued their physician-patient relationship in order to engage in a sexual relationship. This constitutes sexual exploitation under Business and Professions Code section 729.

67. Dr. Phillips also evaluated respondent's conduct in providing bereavement therapy to Patient A. The standard of care requires that physicians practice within their scope of knowledge and training. Patients should be able to assume that when a patient begins treatment, the physician has the requisite knowledge and experience to provide the service in a competent manner.

Dr. Phillips acknowledged that respondent denied providing therapy to Patient A. However, the records documented therapy sessions and contained diagnoses. Dr. Phillips was unable to find evidence that respondent referred Patient A to the mental health professionals or coordinated his care with them. Respondent's counseling was not within the scope of his training as an Ob/Gyn. Dr. Phillips noted that although respondent had a master's degree in behavioral science, he was not licensed to provide counseling.

In addition, Dr. Phillips noted that there were hundreds of text messages between respondent and Patient A from April 2012 to October 2013, which was unprofessional. It is important to maintain boundaries, especially between a male Ob/Gyn and a female patient because the relationship involves a very intimate part of a woman's life. This intimacy obligates the physician to draw clear boundaries and roles.

Dr. Phillips opined that respondent's provision of mental health counseling to Patient A constituted unprofessional conduct and a simple departure from the standard of care because he lacked the proper training and experience.

68. Dr. Phillips explained that when a physician prescribes a medication, he or she is required to have a medical knowledge of the drug and its appropriate uses and contraindications.

Dr. Phillips noted that respondent did not express a clear understanding of the uses and contraindications for Misoprostol during his Board interview, and that he prescribed it to Patient A after their physician-patient relationship had terminated. He opined that respondent's writing the prescription of Misoprostol when Patient A was pregnant represented a lack of knowledge and an extreme departure from the standard of care.

2017 Kaiser Investigation

69. Kaiser opened another investigation into respondent's misconduct after the Board filed its accusation. It considered Dr. Phillips's reports, deposition testimony from the civil suit, Patient A's medical records and respondent's cell phone records. The Kaiser committee also interviewed numerous witnesses, including respondent.

70. On June 12, 2017, Kaiser substantiated the following allegations: 1) respondent inappropriately provided bereavement counseling to Patient A without having the proper credentials and training; 2) respondent failed to properly document the counseling appointments; 3) respondent behaved inappropriately within a patient-physician relationship; 4) respondent backdated a prescription for Misoprostol from February 21, 2014 to January 5, 2014; 5) respondent inadequately documented the Misoprostol prescription; and 6) respondent prescribed the Misoprostol without informed consent.

71. The Kaiser committee concluded that there existed a wide gap in respondent's and Patient A's accounts of what occurred on February 21, 2014, and that respondent's description of what occurred was implausible, at times contradictory, and changed significantly over time. The committee concluded that respondent's accounts of his relationship with Patient A were very inconsistent, particularly with regard to when the relationship became sexual and the events that occurred on February 21, 2014, and that the inconsistences hurt his credibility. The committee also found that respondent appeared to be overtly manipulative during his three interviews with the committee. The committee reported that respondent claimed that he had been punished repeatedly and that the only thing he really did wrong was have an affair, and that he was not too concerned about having had a relationship with a patient because it was his first offense.

The committee found that respondent blamed Patient A and accused her of faking her pregnancy, which the committee found especially farfetched in light of evidence in the medical record documenting the pregnancy. Although the committee noted some inconsistencies with Patient A's statements also, on the whole, it concluded that the evidence supported the accuracy of her statements.

Character and Rehabilitation Evidence

72. Respondent was raised by his mother and grew up in extreme poverty. At age 17, his mother was diagnosed with breast cancer and the family did not have medical insurance. In 1985 his mother suffered a relapse and she passed away in 1988 while he was in college. Respondent was inspired by her physicians to attend medical school. Respondent states that he has devoted his life and career to protecting and caring for women.

73. Initially, respondent wanted to teach medicine, but he compromised this goal to have a more flexible schedule for his family. Respondent accepted the role of medical director because it is a teaching role. In this position, he sought to implement a team approach in the unit and to involve family members in the decision making process. Respondent also sought to standardize processes and to increase training and teambuilding. He implemented changes to allow residents from a nearby hospital to gain experience at Kaiser. In 2010, respondent received the Teacher of the Year award at Kaiser Santa Rosa. During the same year, respondent was a member of the founding faculty at Touro University Ob/Gyn rotation.

74. Respondent has been a physician for 17 years and has had no previous discipline, patient complaints or lawsuits. Respondent's job performance review dated February 22, 2012, rated respondent's workload and practice habits as exceptional. His service to members and colleagues, group contribution and participation were also rated as exceptional. Dr. Klekman commented that respondent practiced at "the absolute highest standard."

Respondent's job performance review dated February 7, 2013, rated him as exceeding expectations in all categories and noted that he was in the top five in the region for patient satisfaction scores. Dr. Klekman commented that respondent had "really allowed [Kaiser] to deliver on our inpatient work" and "Great Doc & has a lot to do with our success!!"

75. Respondent's job performance review dated January 22, 2015, again rated respondent as an excellent physician, but noted that they were "working hard to navigate through a difficult non clinical situation, and that the hope was that he would be an even greater asset to patients and the department after the issue was resolved."

76. On April 22, 2015, respondent's staff privileges were renewed by Kaiser Santa Rosa.

77. Constance Sinclair has been a registered nurse for 47 years and a nurse midwife for 33 years. She has worked at Kaiser for 20 years and has known respondent for 17 years. They worked a shift together approximately every two-to-three weeks. Sinclair reports that respondent has very high professional standards. In her experience, respondent has been very professional, quiet and skillful. When he accepted a leadership position in the Labor and Delivery Unit, he would visit each patient. He encouraged a team approach in the unit and nurses felt empowered to voice their opinions while he was in charge. Morale was high and the nurses respected him. Kaiser also had a very high satisfaction rate with the patients while

he was the medical director. Respondent encouraged Sinclair to apply for the lead midwife position and recommended her for the position. When she became lead nurse midwife, they worked together on policy issues. He put together a best practices committee.

Sinclair has never observed respondent act inappropriately and never heard patients complain about inappropriate behavior or comments. Sinclair reviewed the allegations made in the accusation and found them to be inconsistent with his character. Sinclair has never observed respondent flirt with a patient or a coworker, including Patient A.

78. Gary M. Green, M.D., is board certified in internal medicine and infectious diseases and is the Chief of the Infectious Diseases Department at Kaiser Santa Rosa. He has known respondent since 2001. They consulted one another regarding patients at the hospital and in the clinic, and have worked together on hospital policies and procedures. Dr. Green and respondent also have a social relationship. Their families have spent holidays together, their children grew up together, they attend church together and their wives are friends.

Dr. Green reports that respondent is the best Ob/Gyn with whom he has worked. He considers respondent to be very hardworking, respectful, clinically skilled and compassionate. Dr. Green describes respondent as having a calm demeanor and being a good role model. Respondent served as the obstetrician for Dr. Green's wife and he came to the hospital during the middle of the night to care for her in an emergency.

In June 2014, respondent told Dr. Green about his affair with Patient A and appeared forthcoming, upset and remorseful. Respondent did not tell Dr. Green at the time that Patient A had been a patient of his; Dr. Green learned that at a later time. Dr. Green could not imagine respondent having conducted himself as described in the accusation. Since the affair ended, Dr. Green has observed respondent to focus on his children.

79. Peggy Jacobsen is a registered nurse employed by TPMG in the clinic where respondent practiced. She worked with respondent since he was hired in 2000. Jacobsen considers respondent to be one of the most professional and kind physicians on staff. She has never heard of a patient complaint regarding respondent. He is available to nurses to discuss issues and is well-respected. In Jacobsen's experience, respondent has been incredibly sensitive and understanding with his patients. Respondent is the Ob/Gyn for her and several family members; respondent saved her daughter's life in his role as her Ob/Gyn.

Despite having read the allegations contained in the accusation, Jacobsen is comfortable with respondent providing care to her and her family members. Jacobsen has never seen respondent engage in conduct that is consistent with the allegations contained in the accusation. In her experience, respondent always has a third party present during examinations and treats his patients with courtesy, kindness and respect. Jacobsen is aware that respondent had an affair with a coworker; she did not know that the coworker had been his patient and does not recall if he mentioned that.

80. Summer Joslin has been a registered nurse at Kaiser since 1987. She worked with respondent on the Labor and Delivery Unit since 2000. Joslin considers respondent to be soft spoken, friendly, professional and kind. He has an excellent reputation as a clinician. Respondent had a high standard of expectation for the delivery of care and could be critical if a team member was not providing the highest level of care. However, respondent was not disliked personally. In Joslin's experience, respondent's patients loved him. Respondent provided care for Joslin and her family members and she would continue to allow him to be their physician. Joslin initially had a positive opinion of Patient A; she considered her to be smart, soft spoken and devoted to her family. After the affair, she changed her opinion; she now considers Patient A to be vindictive and untruthful. Joslin does not believe the allegations in the accusation.

81. Ruth Mielke is a certified nurse midwife. She has been employed by Kaiser in Sacramento, Santa Rosa and Santa Clara. She worked with respondent in Santa Rosa. While they worked together, she found respondent to be kind, professional and approachable. In her experience, respondent was professional and decisive with patients. Respondent encouraged Mielke to transfer to Santa Clara which is a busier hospital and which provided professional advancement. Mielke disliked Patient A and did not feel she could trust her patient assessments. Mielke considered respondent to be a good listener, but did not believe that respondent would practice in an area in which he was not qualified.

82. Dawn Reitz has been a registered nurse for 34 years. She has been employed in the Labor and Delivery Unit at Kaiser Santa Rosa for 18 years. She worked with respondent for 17 years and considers him to be intelligent, professional, kind and approachable. Respondent created a sense of family in the unit when he was the medical director. They would eat meals together; respondent had them join hands and say a prayer before eating.

83. Since 2012, Father Angelito Peries has been the pastor at the Lady of Perpetual Help Catholic Church in Calistoga, California. Respondent and his wife and children attended services at the church. Father Peries came to know respondent as a member of the congregation. Respondent and his wife invited Father Peries to lunch in their home and they became friends. Father Peries considers respondent to be a very kind, honest man who is faithful to his conscience. Respondent meets with Father Peries once per week in person to discuss his core values and morals. Respondent's spirituality is very important to him. Father Peries testified at hearing, but appeared to be biased toward respondent, which diminishes the value of his counseling of respondent as evidence of rehabilitation.

At one point, respondent told Father Peries that he had become close friends with a married woman and he asked for guidance. Father Peries advised him that just because he was married did not mean he was not attracted to others and that it was fine to pursue the friendship if he remained faithful in his marriage. After the relationship ended, respondent seemed remorseful. Father Peries believes that respondent is now more committed to his work and has grown from the experience. Father Peries recommended that respondent pray for guidance.

84. Respondent concedes that he should not have invited Patient A to his hotel room on the evening of October 3, 2013, because it undermined the confidence of his staff in his leadership and interfered with his goals as medical director. He states he would not make that mistake again.

85. Respondent states that he regrets writing the Misoprostol prescription because Patient A was no longer his patient; he also regrets not having documented the prescription in her chart. Respondent reports that Dr. Klekman discussed the issue with him and reminded him that he was required to document any prescriptions in the chart. Dr. Klekman also went over the procedures for restricting a patient's work schedule, and reiterated that it is inappropriate to go to a hotel room with a patient or a coworker at a conference.

86. Respondent does not believe there were any policies or procedures at Kaiser that prohibited a relationship between coworkers in 2013 or 2014; Kaiser later adopted such a policy. Respondent understands that because he was in a leadership role at the hospital he was held to a higher standard and his conduct should have been beyond reproach. Respondent did not object to being removed from the position of medical director as a result of his behavior.

87. Respondent's daughter is attending college and his son is a junior in high school. Respondent would like to pursue his original goal of teaching and to provide clinical care with medical students and residents. Respondent recently met with a Department Chair at Touro University about becoming a member of the faculty. She advised respondent that he would not be credentialed as a result of allegations in the accusation. Respondent felt that she believed the allegations and he was extremely disappointed.

88. Respondent attended a medical record keeping course on September 15 and 16, 2017, earning 17 hours of continuing medical education. The course reinforced the importance of documenting patient interactions so that others can understand them, to document instructions to patients, to avoid template distractions, to be concise and write legibly.

89. On October 20 through 22, 2017, respondent attended the PBI Professional Boundaries and Ethics Course at the University of California, Irvine. The course covered the standards of practice, codes of ethics and state statutes on the subject matter. Attendees were taught to: 1) demonstrate appropriate clinical decision making by minimizing negative influences; 2) adhere to professional boundaries with resultant improvements in the physician-patient interaction; 3) reduce the potential of transgressions through the development of systems; 4) become aware of the early warning signs indicative of ethical dilemmas and boundary problems; and, 5) create and implement a tiered Protection Plan to maintain appropriate boundaries.

Respondent created a protection plan covering the areas of his organizational workplace, his professional environment and his personal life. Respondent's plan in the organization included items such as the use of a chaperone, documenting the name of the chaperone, adopting and posting a Patient Bill of Rights stating that the office is a sexual

harassment free zone and designating a nurse to receive complaints, distributing patient surveys, obtaining a peer monitor to discuss boundary concerns, developing a written policy regarding physician-patient interactions, and developing a scheduling protocol.

Regarding his professional plan, respondent commits to avoiding dual relationships with patients, colleagues and staff, avoiding situations creating even the perception of professionalism, working with physicians who support his plan, reducing his hours to avoid burn out, allowing contact by staff and patients through official channels only, continuing in weekly teleconference seminars with the PBI program, reviewing the ACOG Code of Ethics annually, seek out materials on ethics, dress professionally, and transmit his knowledge to others.

With regard to respondent's personal life, he plans to establish and maintain a balance between his personal and professional life, continue with psychotherapy, develop and maintain a healthy relationship with his girlfriend, limit participation in professional activities, attend church for spiritual support and provide an excellent role model to his children.

90. Respondent's attendance at the Boundary and Ethics Course is commendable and demonstrates a commitment to working toward creating important professional boundaries. However, in response to the following questions, respondent failed to demonstrate that he has gained any insight into his misconduct with Patient A. Respondent was asked whether his relationship with Patient A was consensual and he replied that it was. When asked whether he learned that the physician-patient relationship involves an imbalance of power making the relationship nonconsensual, he agreed again. Similarly, when asked if a physician can have a sexual relationship with a patient after ending the relationship, he replied that that was not permissible. However, when asked if he had an impermissible relationship with Patient A, he replied that he had not because the physician-patient relationship had terminated prior to their sexual relationship beginning. Although respondent is making an effort to learn his professional boundaries, he still does not grasp the concepts when evaluating his own misconduct.

91. Respondent has been under the care of psychologist Melissa Staehle, Ph.D., since November 2014. He sought treatment because he was involved in civil litigation and a divorce, he had hurt those around him, had sole custody of his children, had stress at work and wanted to understand how he had let the relationship with Patient A happen. Dr. Staehle suggested that respondent's needs were not being met in his marriage and he had failed to address that. Respondent now recognizes that he should voice unhappiness rather than look for other ways to meet his needs; he will reach out to colleagues, his priest, friends and his therapist for advice when needed. Respondent has worked with Dr. Staehle to forgive himself and to get past the shame of the ordeal. Respondent feels that he has benefited tremendously from therapy.

92. Dr. Staehle testified at hearing. During respondent's first appointment, she documented the following in her chart: "affair w/nurse at sister company beg. 10/13 – summer 2014. Woman has become angry, aggressive when he broke up w/her and wouldn't divorce

his wife Susan of 26 years." At hearing, Dr. Staehle claimed that her note was not accurate; she said that she recalled respondent telling her the friendship began in October 2013, but that they did not have sexual relations for several months. This testimony contradicted the notes and undermined Dr. Staehle's credibility.

93. Dr. Staehle initially diagnosed respondent with an adjustment disorder with anxiety and depression. She believes what respondent told her of his relationship with Patient A, stating that respondent has no reason to lie to her. Dr. Staehle believes that respondent was in a loveless marriage for a long time and he stayed to be a responsible father to his children. In a letter dated August 23, 2017, Dr. Staehle wrote that respondent had sought therapy to gain insight into how he had allowed himself to get involved in an extramarital affair with a coworker. Dr. Staehle testified that although it is not documented anywhere in her notes, she recalls respondent telling her that Patient A had been his patient. Dr. Staehle feels that Patient A was a predator looking for respondent's financial support. During her testimony, Dr. Staehle appeared biased in favor of respondent.

94. Dr. Staehle's treatment plan includes weekly psychotherapy, meditation, and eye movement desensitization reprocessing as needed. She encourages respondent to exercise regularly, not drink too much, get enough sleep and eat healthy meals. Dr. Staehle believes that treatment has helped respondent and that he is not a danger to patients. She would trust her family members with his care. Dr. Staehle does not believe ongoing therapy is necessary.

95. Respondent is concerned about the consequences of being on probation to the Board. He believes that insurers will be fearful of including him on their physician panels and that he would lose his board certification if he is placed on probation. Respondent is willing to accept a reprimand and to take any educational course, but he feels placing his license on probation would be punitive since this involves "an isolated incident." Respondent notes that he has an obligation to support his ex-wife and children.

LEGAL CONCLUSIONS

Introduction

1. The purpose of an administrative proceeding concerning licensure is not to punish the respondent, but rather is "to protect the public from dishonest, immoral, disreputable or incompetent practitioners [citations omitted]." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The goal is the prevention of future harm and the improvement and rehabilitation of the licensee. It is far more desirable to impose discipline before a licensee harms any patient than after harm has occurred. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.) While the objective, wherever possible, is to take action that is calculated to aid in the rehabilitation of the licensee, protection of the public shall be paramount. (Bus. & Prof. Code, § 2001.1.)

2. The standard of proof regarding the charging allegations is "clear and convincing" and the burden of proof is on complainant. (*Ettinger v. Board of Medical Quality Assurance, supra*, 135 Cal.App.3d at 856; see also *Medical Board of California v. Superior Court (Liskey)* (2003) 111 Cal.App.4th 163, 170-171.) This means the burden rests on complainant to establish the charging allegations by proof that is clear, explicit and unequivocal – so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

Unprofessional Conduct

3. Business and Professions Code section 2234 authorizes the Board to impose discipline against any licensee who is charged with unprofessional conduct, including an act of gross negligence (subd. (b)), repeated negligent acts (subd. (c)), or incompetence (subd. (d)).

4. The evidence established that respondent engaged in a sexual relationship with Patient A while she was his patient. This conduct constituted an extreme departure from the standard of care and gross negligence. (Factual Findings 28 through 31, 34, 41 and 63.)

The evidence established that respondent terminated Patient A as a patient in order to engage in a sexual relationship with her. This conduct constituted an extreme departure from the standard of care and gross negligence. (Factual Finding 28 through 31 and 66.)

The evidence established that respondent predated the Misoprostol prescription and provided the prescription to Patient A in order to induce an abortion. This conduct constitutes an extreme departure from the standard of care and gross negligence. (Factual Findings 41 and 64.)

The evidence established that respondent continued to prescribe medical care to Patient A after the professional relationship formally ended by prescribing Misoprostol to Patient A, which constituted a simple departure from the standard of care and a negligent act. (Factual Findings 29, 41 and 65.)

The evidence established that respondent provided bereavement counseling to Patient A, a service that is beyond the scope of his knowledge and training as an Ob/Gyn. This conduct constitutes a simple departure from the standard of care and a second negligent act. (Factual Findings 12 through 27, 67.)

Cause for discipline exists pursuant to Business and Professions Code section 2234, subdivisions (b) and (c).

5. Although respondent did not demonstrate knowledge of the uses of Misoprostol during his Board interview, the evidence established that he was aware that the medication caused miscarriages and abortions and for that reason he prescribed it to Patient A when she discovered she was pregnant. Despite his comments to the contrary, the evidence did not establish that respondent lacked knowledge of Misoprostol's alternate uses for obstetrics and

gynecology. No cause for discipline exists pursuant to Business and Professions Code section 2234, subdivision (d).

Sexual Misconduct

6. Business and Professions Code section 726 provides that any act of sexual abuse, misconduct or relations with a patient constitutes unprofessional conduct and grounds for disciplinary action.

The evidence established that respondent committed sexual misconduct with Patient A. (Factual Findings 28 through 31, 34, 62 and 63.) Cause for discipline exists pursuant to Business and Professions Code section 726.

Sexual Exploitation

7. Business and Professions Code section 729, subdivision (a), provides that any physician who engages in an act of sexual intercourse or sexual contact with a patient, or with a former patient when the relationship was terminated primarily for the purpose of engaging in those acts, absent an exception not applicable here, is guilty of sexual exploitation. Consent of the patient is not a defense.

The evidence established that respondent terminated the physician/patient relationship in order to engage in a sexual relationship with Patient A. Cause for discipline exists pursuant to Business and Professions Code section and 729. (Factual Findings 28 through 31, 34 and 66.)

Disciplinary Considerations

8. Cause for discipline having been established, the issue is the appropriate measure of discipline. Business and Professions Code section 2229 mandates that the protection of the public shall be the highest priority for the Board. Section 2229 further specifies that, to the extent not inconsistent with public protection, disciplinary action shall be calculated to aid in the rehabilitation of licensees. To implement the mandates of section 2229, the Board has adopted the Manual of Model Disciplinary Orders and Disciplinary Guidelines (guidelines), 12th Edition.

The recommended discipline for a violation of Business and Professions Code section 2234, subdivisions (b) and (c), ranges from a stayed revocation with a five-year probationary term with appropriate terms, to revocation. The recommended discipline for violating Business and Professions Code section 726 ranges from a stayed revocation with a seven-year probationary term with appropriate terms, including a 60-day suspension, to revocation.

The minimum recommended discipline for a violation of Business and Professions Code section 729 is revocation. In support of this discipline, the guidelines cite to Business and Professions Code section 2246, which mandates revocation in cases involving two or more

victims or where the offender has at least one prior finding of sexual exploitation. Those circumstances do not exist here. It is therefore unclear whether revocation is the recommended penalty when the elements of section 2246 are not met. The appropriate penalty will therefore be evaluated assuming that the recommendation only applies if the criteria identified in Business and Professions Code section 2246 are met.

9. Respondent undoubtedly has provided good and caring treatment to many patients over the course of his career. Dr. Green considered respondent to be the best Ob/Gyn he had met. However, Dr. Green's testimony is undermined by his long term friendship with respondent and that fact that respondent did not initially tell him that Patient A had been a patient of his; whether he is aware of all of the evidence underlying the allegations is unclear. The remaining character witnesses all respect respondent's character and abilities. Many of them expressed gratitude for his personal encouragement or care for relatives. Several also expressed dislike of Patient A, which reinforced the negative impact of this incident on the Labor and Delivery Unit at Kaiser Santa Rosa. All stated that they simply did not believe the allegations in the accusation. Again, it is unclear whether they were privy to all of the underlying evidence and objective documentation which established the truth of many of the allegations. Their opinions about respondent's leadership and clinical skills are noted; however, their opinions about his character were inconsistent with his misconduct and continued denial of the facts.

There is more to being a physician than knowledge, technical ability and being well-liked. Honesty and integrity are required in all aspects of the practice of medicine. A physician's personal qualifications necessarily include honesty, integrity, and judgment. The relationship between a physician and patient is grounded in the utmost trust and confidence in the physician's honesty and integrity. Respondent's behavior with Patient A was highly inappropriate, manipulative and involved intentional dishonesty. The conduct resulted in the breakup of two marriages. It resulted in inefficiencies and divisiveness within the Labor and Delivery Unit. It also resulted in the loss of trust by a patient in her physician. In determining the appropriate disciplinary penalty, the seriousness of the misconduct is a factor. (*Marie Y. v. General Star Indem. Co.* (2003) 110 Cal.App.4th 928.) Respondent's misconduct was extremely serious.

The seriousness of misconduct is balanced against the physician's showing of rehabilitation. The burden of establishing rehabilitation is on respondent and the standard of proof is a preponderance of the evidence. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164; Evid. Code, §§ 115, 500.) Respondent's denial that he entered into a sexual relationship, or even contemplated one, when he invited Patient A to his hotel room, is not credible. He made inconsistent statements about when their sexual relationship began, until his hearing testimony when he recalled exactly when it began; his testimony on this issue lacked credibility. The assertion that because he had terminated the physician-patient relationship a month or so before entering into a sexual relationship with Patient A rendered his conduct within professional standards, shows a lack of insight and disregard of his professional obligations and boundaries. Respondent's denial that he wrote the Misoprostol prescription in order to induce an abortion was inconsistent with the other evidence, not

credible and very troubling. And, respondent's manipulative conduct toward Patient A, a woman in an inferior position at the hospital who had previously been the victim of sexual abuse, during times in which she was mourning the loss of her foster child and became pregnant by him, compromised patient care.

Respondent's continued dishonesty at hearing demonstrates a lack of moral character and a failure to accept responsibility for his misconduct. Respondent blamed Patient A, falsely claiming that she was lying, had demanded money from him and had threatened him. Respondent went so far during his Kaiser interviews as to allege that Patient A might not have been pregnant in February 2014, despite various medical records confirming it. Intentional dishonesty demonstrates a lack of moral character and can indicate unfitness to practice medicine. (*Matanky v. Board of Med. Examiners* (1978) 79 Cal.App.3d 293, 305.)

It is acknowledged that respondent has taken a medical record keeping course and a boundaries course, has promised not to repeat his misconduct, and has sought counseling from his priest and his therapist. However, he did not demonstrate that he gained any insight into professional boundaries when testifying about what he had recently learned during the course. And, because his priest and therapist have fully accepted respondent's version of the underlying events and appeared biased in his favor when they testified, the counseling he received does not provide a foundation upon which the Board can be assured that respondent has made progress in addressing his misconduct.

The purpose of physician discipline by the Board is not penal but to protect the life, health and welfare of the people at large and to set up a plan whereby those who practice medicine will have the qualifications which will prevent, as far as possible, dangers which could result from a lack of honesty and integrity. (*Furnish v. Board of Medical Examiners* (1957) 149 Cal.App.2d 326.) The expression of remorse and the taking of responsibility for past misconduct are relevant in assessing rehabilitation, just as the absence of remorse and the failure to take responsibility are aggravating factors. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940 [fully acknowledging the wrongfulness of one's actions is an essential step towards rehabilitation].)

The Board properly may take into account the accused physician's attitude toward the disciplinary proceeding and his character as evidenced by his behavior and demeanor at trial. (*Landau v. Superior Court* (1988) 81 Cal.App.4th 191, 223; *Yellen v. Board of Medical Quality Assurance* (1985) 174 Cal.App.3d 1040, 1059.) Respondent's failure to accept responsibility for his misconduct was evident when he suggested that placing his license on probation would be punitive because his misconduct involved an isolated incident and because he needed to earn a living, noting that probationary conditions would hamper his ability to secure employment. This testimony is consistent with his reported statements to the Kaiser committee to the effect that the only thing he really did wrong was have an affair and that he was not too concerned about it because it was his first offense. Respondent's attitude in this regard demonstrates a fundamental lack of insight into his misconduct.

Respondent's continued untruthfulness, and statements minimizing his misconduct, are at odds with a finding of rehabilitation. Respondent has demonstrated a willingness to misuse his license and to lie to protect it; this behavior constitutes a danger to patients. Based on respondent's dishonesty, lack of insight, manipulative behavior and the failure to accept full responsibility for his misconduct, as well as his numerous errors in judgment, probation is not appropriate. Revocation of respondent's certificate is necessary to protect the public until such time as respondent can demonstrate his rehabilitation.

ORDER

Physician's and Surgeon's Certificate No. A71262, issued to Austin Merritt Kooba, M.D., is revoked.

DATED: December 13, 2017

DocuSigned by:
Jill Schlichtmann
D0097D940B484D9

JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings

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BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **Austin Merritt Kooba, M.D.** Kaiser Permanente 401 Bicentennial Way Santa Rosa, CA 95403 **Physician's and Surgeon's Certificate No. A71262,** Respondent.	Case No. 800-2014-007184 **A C C U S A T I O N**

Complainant alleges:

PARTIES

1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On or about April 7, 2000, the Medical Board issued Physician's and Surgeon's Certificate Number A71262 to Austin Merritt Kooba, M.D. (Respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on November 30, 2017, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2004 of the Code provides that the Board[1] is responsible for the administration and hearing of disciplinary actions involving enforcement of the Medical Practice Act (section 2000 et seq.) and the carrying out of disciplinary action appropriate to findings make by the Board or an administrative law judge with respect to the quality of medical practice carried out by physician's and surgeon's certificate holders.

5. Section 2227 of the Code provides that a licensee who is found guilty under the Medical Practice Act may have his or her license revoked or suspended for a period not to exceed one year; or the licensee may be placed on probation and may be required to pay the costs of probation monitoring; or may have any other such action taken in relation to discipline as the Board deems proper.

6. Section 726 of the Code states:

"The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division, under any initiative act referred to in this division and under Chapter 17 (commencing with Section 9000) of Division 3.

"This section shall not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship."

7. Section 729 states in relevant part:

"(a) Any physician and surgeon, psychotherapist, alcohol and drug abuse counselor or any person holding himself or herself out to be a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor, who engages in an act of sexual intercourse, sodomy, oral copulation,

[1] The term "Board" means the Medical Board of California. "Division of Medical Quality" shall also be deemed to refer to the Medical Board. (Bus. & Prof. Code § 2002.)

or sexual contact with a patient or client, or with a former patient or client when the relationship was terminated primarily for the purpose of engaging in those acts, unless the physician and surgeon, psychotherapist, or alcohol and drug abuse counselor has referred the patient or client to an independent and objective physician and surgeon, psychotherapist, or alcohol and drug abuse counselor recommended by a third-party physician and surgeon, psychotherapist, or alcohol and drug abuse counselor for treatment, is guilty of sexual exploitation by a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor.

"...

"(b)(5) An act or acts in violation of subdivision (a) with two or more victims, and the offender has at least one prior conviction for sexual exploitation, shall be punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of 16 months, two years, or three years, and a fine not exceeding ten thousand dollars ($10, 000).

"For purposes of subdivision (a), in no instance shall consent of the patient or client be a defense. However, physicians and surgeons shall not be guilty of sexual exploitation for touching any intimate part of a patient or client unless the touching is outside the scope of medical examination and treatment, or the touching is done for sexual gratification.

"(c) For purposes of this section:

"(1) "Psychotherapist" has the same meaning as defined in Section 728.

"(2) "Alcohol and drug abuse counselor" means an individual who holds himself or herself out to be an alcohol or drug abuse professional or paraprofessional.

"(3) "Sexual contact" means sexual intercourse or the touching of an intimate part of a patient for the purpose of sexual arousal, gratification, or abuse.

"(4) "Intimate part" and "touching" have the same meanings as defined in Section 243.4 of the Penal Code.

"...

"(e) This section does not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon

provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship."

8. Section 2234 of the Code, states in relevant part:

"The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

". . .

"(b) Gross negligence.

"(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

"(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

"(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

"(d) Incompetence.

FIRST CAUSE FOR DISCIPLINE

(Unprofessional Conduct: gross negligence; and/or repeated negligent acts; and/or incompetence in the care of Patient A)

9. Respondent is subject to disciplinary action for unprofessional conduct [2234], and/or gross negligence [2234(b)], and/or repeated negligent acts [2234(c)], and/or incompetence [2234(d)] based on the care provided and the sexual relationship he engaged in with Patient A.[2] The circumstances are as follows:

[2] In order to protect the patient's privacy, the letter "A" will be used. Respondent may learn the patient's identity during the discovery process.

10. Respondent is 52 years old and practices as an obstetrician/gynecologist at Kaiser Permanente – Santa Rosa (Kaiser) and is board certified by the American Board of Obstetrics and Gynecology.[3] He began acting as Patient A's obstetrician/gynecologist (Ob/Gyn) on January 24, 2002. Respondent served as Patient A's obstetrician for three of her pregnancies and delivered two of her babies. Patient A's last in person office visit with Respondent was on September 12, 2012.

11. Over the years, Patient A and Respondent became friendly and the patient sought his advice regarding nursing school and her subsequent nursing employment.

12. Patient A began working as a nurse at Kaiser Permanente – Santa Rosa in approximately December of 2010. She worked nights in the postpartum department.[4] She worked nights in the post at that time, Respondent was the Director of Labor and Delivery for Kaiser – Santa Rosa. After four months, Patient A moved to nights in the Labor and Delivery Unit and then eventually switched to day shifts. Respondent continued to act as Patient A's obstetrician/gynecologist while she also worked as a nurse alongside Respondent. Respondent was very flirtatious with Patient A when they worked together, including requesting that she specifically assist him with deliveries, commenting on her looks, touching her arms, and rubbing his body against her in the operating room.

13. In April of 2012 Patient A's infant son died unexpectedly.

14. Following the death of her son, Patient A did not want to return to work in the Labor and Delivery Unit. She expressed her concerns to Respondent and he indicated he would help her with the paperwork to stay off of work because he did not want her to quit working in Labor and Delivery. Respondent also offered to provide her counseling sessions. Although Respondent told Patient A that he had a background in psychiatry, in reality he has a master's degree in behavioral studies and no training in providing psychiatry or counseling.

[3] Respondent is employed by The Permanente Medical Group, Inc.
[4] Patient A is employed by Kaiser Foundation Hospitals.

15. From April 24, 2012 through December 2012, Respondent provided Patient A with "Bereavement Counseling."[5] According to Patient A she saw him approximately twenty times for counseling sessions but Respondent did not document all of the appointments. The Patient would schedule "Bereavement Counseling" sessions with Respondent through his staff, 12 of which were documented visits. The documented visits would generally last thirty minutes to an hour. The remaining sessions, which took place after Patient A's work shift, were arranged directly between Respondent and Patient A via text message or phone. Patient A would go to Respondent's office during his "administrative" time[6] and she would spend several hours with Respondent during these counseling sessions. None of the "Bereavement Counseling" was paid through insurance or from Patient A.

16. Respondent completed progress notes for 12 "Bereavement Counseling" sessions and listed various diagnoses for Patient A such as "Stress," "Bereavement Counseling," or "Bereavement Counseling: Uncomplicated." The progress notes contain very little information and are maintained in the SOAP note format. Most of the progress notes indicate that Respondent and Patient A "reflected on issues from last appointment."

17. On or about April 24, 2012, Respondent documented in the first progress note that he was providing a "Consultation" for Patient A and he diagnosed her with "acute stress disorder" following the death of a child. He also documented that Patient A was not able to return to work. Respondent informed Patient A that he had to "fight" with her supervisors to get her time off of work and a modified schedule approved.

18. On or about May 16, 2012, Respondent listed the diagnosis as "Stress" following the patient's complaints of difficulty sleeping. He also noted that she needed more time off of work and was unable to get an appointment for the psychiatry department until June, but "wants to talk to me [Respondent] sooner."

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[5] Respondent labeled the majority of the documented counseling sessions with Patient A as "Bereavement Counseling."

[6] As the Director of Labor and Delivery, Respondent had time set aside in his schedule that permitted him to devote to work as the Director, rather than having to see patients. This was referred to as "administrative" time.

19. On or about May 30, 2012, Patient A was seen by a Licensed Clinical Social Worker (LCSW) during a telephone triage screening for anxiety and trauma following her son's death. That same day, a psychologist conducted an urgent psychological intake of Patient A. The following day, another psychologist saw Patient A and provided urgent care follow-up.

20. On or about June 5, 2012, Patient A attended the first of four group sessions titled "Anxiety Introduction Group" with a licensed psychologist.

21. On or about June 7, 2012, Patient A first saw a psychologist for a "Bereavement Counseling" follow-up appointment. Shortly thereafter, she saw a psychiatrist for her adult psychiatry intake appointment. The psychiatrist also wrote a memo requesting that Patient A be permitted to continue on modified work duties by not having direct patient care.

22. Later on June 7, 2012, at approximately 1:30 p.m., Respondent saw Patient A for "Bereavement Counseling: uncomplicated" and he prescribed Patient A 10 milligrams (mg) of Ambien[7] (15 pills, with no refills). Under the progress note portion, Respondent wrote "Continued discussion of bereavement of son, and how other events in her past have influenced these feelings. Improving. Still not ready to return to work with direct patient care. Will have on modified for another two weeks. F/u [follow-up] in one week."

23. After the first three mental health sessions with Kaiser staff, Patient A was still thinking about leaving the labor and delivery unit because of her anxiety associated with her deceased son. Respondent recommended Patient A discontinue her therapy with the mental health services and instead to rely on the "Bereavement Counseling" that he was providing.

24. On or about June 12, 2012, Patient A attended the second "Anxiety Introduction" group session. She never returned for the last two group sessions.

[7] Ambien is the trade name for zolpidem tartrate and is a non-benzodiazepine hypnotic. It is a dangerous drug as defined in section 4022 and a Schedule IV controlled substance as defined in Health and Safety Code section 11507(d)(32). Ambien is a central nervous system (CNS) depressant and should be used cautiously in combination with other CNS depressants. Any CNS depressant could potentially enhance the effects of Ambien, and should be closely administered in patients exhibiting the signs and symptoms of depression. Because of the habituation and dependence associated with Ambien usage, individuals with a history of alcohol and/or substance abuse history should be carefully monitored.

25. On or about June 28, 2012, Patient A cancelled her psychology appointment. Patient A did not return to Kaiser Permanente's mental health services, and instead received "counseling" from Respondent.

26. While Respondent was providing "Bereavement Counseling" to Patient A he also wrote three internal memo's verifying her visits with the Ob/Gyn department in order to allow her to stay on modified work. Patient A had no actual care or appointments in the Ob/Gyn department during the time Respondent was providing "Bereavement Counseling."

27. Starting in about the fourth therapy session, Respondent began asking Patient A about her sexual history and sex life with her husband. During one of the sessions, the patient disclosed that she was molested as a child. Respondent also discussed his sex life with his wife during the sessions. The patient was uncomfortable with the sexual nature of the discussions and would often end their sessions early and leave Respondent's office.

28. At one of the last therapy sessions, Patient A was recalling an upsetting situation and Respondent reached out and touched her upper thigh in what she perceived to be a sexual nature. He then tried to kiss her. The patient pulled away and then left the office.

29. On or about September 12, 2012, at the last documented "Bereavement Counseling" appointment, Respondent again prescribed Patient A 10 mg of Ambien (15 pills, with no refills). No other notes were completed for the session.

30. Respondent and Patient A continued to see each other for "Bereavement Counseling" through December 2012 and they continued to work together. Respondent remained overly friendly and flirtatious with Patient A. Between April 19, 2012 through June 12, 2014, the cell phone records between Respondent and Patient A show hundreds of text messages and phone calls with each other. Many calls were placed during non-business hours.

31. On or about June 15, 2013, Respondent prescribed Patient A 10 mg of Ambien (15 pills, with no refills). According to the Department of Justice Controlled Substance Utilization Review and Evaluation System, this prescription had a new number from the prescriptions Respondent wrote for Patient A in July 2012 and September 2012. There was no documentation in Patient A's medical record regarding this prescription.

32. In early October 2013, Patient A attended a work conference out of town. During the second night of the conference, Patient A was sitting in the lounge area of the hotel with two other Kaiser nurses and Respondent discussing rumors about possible budget cuts. Respondent and one of the nurses got into a heated discussion about which department should lose staff. Eventually the two nurses left. Patient A and Respondent were then joined by two other Kaiser nurses, a husband and wife. Shortly thereafter, Patient A became uncomfortable with the conversation and said she was going back to her room. Respondent said he would walk her to her room. On the way to the room, Respondent pulled Patient A into the stairwell and insisted that she go to his room with him, which she agreed to.

33. Once in Respondent's room, the two talked for a while. Respondent told Patient A that from the first time he saw her in an exam room he was attracted to her. He even remembered the examination room number where he first saw her. At this point they began kissing. Respondent tried to remove her shirt, but Patient A was uncomfortable with that. Respondent told her she was beautiful and "he had seen it all before." The patient felt a strong emotional bond with Respondent, and eventually she let him undress her. He then got undressed. Patient A was not ready to have sexual intercourse but remembered a time when Respondent told her during "Bereavement Counseling" that his wife refused to perform oral sex on him. Patient A then performed oral sex on Respondent. After she performed oral sex, Respondent told Patient A that he could no longer be her doctor.

34. Afterwards, she remained in his room and they continued to talk throughout the night, including about their spouses and families. Respondent relayed that he and his wife planned on getting divorced when their youngest child graduated high school. While they talked they also continued to kiss, but did not have sexual intercourse. Patient A returned to her room at 6 a.m., which she was sharing with one of the other nurses.

35. When Patient A returned to work that following Monday she immediately changed her Ob/Gyn doctor. On or about October 28, 2013, another doctor at Kaiser officially became Patient A's selected Ob/Gyn doctor.

36. The relationship between Patient A and Respondent escalated quickly after this point. Within the next two to three weeks they drove out to Bodega Bay and had sexual intercourse for the first time in a car. Patient A would go to Respondent's office when she got off of work around 3:30 p.m., while he was still working, and they would have sex in his office. They would also meet in the clinic when it was closed during Respondent's night call shifts and have sex. They had sex in Respondent's office two to three times per week, including when he was on duty and was required to report for patient care.

37. Respondent admitted to engaging in a sexual relationship with Patient A.

38. On or about Friday February 21, 2014, Patient A took a home pregnancy test, which was positive. She then called Respondent at work to tell him. Patient A told Respondent that she was going to the emergency room because she was having severe uterine pain and needed to have her intrauterine device (IUD) removed, which upset Respondent. Respondent told her not to go to the Kaiser emergency room because people would find out about their relationship and he would lose his medical license. This was the first time Respondent mentioned his medical license to Patient A during their relationship. Respondent then instructed Patient A how to remove the IUD herself, which she did.

39. According to Patient A's medical records, she emailed her gynecologist at approximately 1:42 p.m. and requested a quantitative blood HCG test.[8] Patient A had two different blood draws done between February 21 and 23, 2014 to determine her HCG levels. Both showed that she was pregnant, but the second HCG level was lower than the first, indicating she was miscarrying.

40. Respondent then left work early and picked up Patient A to talk. Respondent brought up abortion, which upset Patient A because she had told him in the past that she would never have an abortion. Despite the patient's belief on abortion, an appointment was made at the Planned Parenthood in Clearlake, Lake County, approximately one hour from their location. Respondent

[8] A quantitative human chorionic gonadotropin (HCG) test measures the specific level of HCG in the blood from a hormone that is only produced during pregnancy.

continued to tell Patient A that a baby would destroy both of their families and they would both lose their jobs and he again said he would lose his medical license.

41. Patient A went into the Planned Parenthood Clinic for an intake appointment. The pregnancy test was positive; however, Patient A was not far enough along in the pregnancy for anything to appear in the ultrasound nor was there a heartbeat yet. The records reflected the Patient A reported using an IUD for contraception. Options for termination were given to Patient A but she did not schedule a procedure. Respondent was very angry that she did not have the abortion.

42. Respondent then drove them to the Kaiser clinic, which was closed. Patient A walked over to the hospital and went to the lab for another quantitative HCG test. Back in the clinic, Respondent performed an ultrasound and noted that there was thickening of Patient A's uterus lining, but Respondent did not document this in her medical record. Respondent continued to press the patient about having an abortion, telling her things like "it's just a few cells," that it was "not a viable pregnancy" because of the IUD, and that he could prescribe her medication to terminate the pregnancy.

43. Later on February 21, 2014, Respondent then drove them to a local Walgreens, which is not a pharmacy approved by Kaiser's insurance. Respondent wrote Patient A, a prescription for 200 micrograms of misoprostol[9] (30 pills); however, he backdated it for January 5, 2014. Patient A filled eight pills because insurance would not cover the medication and she had to pay cash for it. Respondent was upset and told her she needed to fill all 30 pills so she then returned and had the pharmacy fill the remaining 22 pills. They picked up the remaining 22 pills through the pharmacy drive-thru window a short time later.

[9] Misoprostol is the generic name for Cytotec. Its approved use is to reduce stomach acid and protect the stomach from damage while a patient takes a non-steroidal anti-inflammatory medication like ibuprofen or aspirin. Misoprostol has a black box warning that it can cause birth defects, premature birth, uterine rupture, miscarriage, incomplete miscarriage, and dangerous uterine bleeding. This medication is commonly used in Ob/Gyn practices, including Kaiser – Santa Rosa, for many different reasons, such as induction of labor, medication abortions, cervical ripening before surgical procedures, and the treatment of postpartum hemorrhage.

44. During Respondent's interview with an investigator on behalf of the Medical Board he stated that the Patient came to him in early January 2014 and requested the prescription for menstrual cramps.[10] He did not document the misoprostol prescription in the patient's medical file; nor did he conduct an examination of the patient before prescribing the medication. Moreover, during the interview, Respondent claimed he was unaware that misoprostol can induce labor/cause a miscarriage.

45. Patient A continued to talk to Respondent about not wanting to take the medication but she knew he would not let her go home until she did. Eventually Respondent put four of the pills in her mouth and kissed her. He thanked her for protecting their families and stated that she was a good mother. Respondent finally took Patient A home around 1:30 a.m. and he slept in his car in her driveway.

46. On Saturday, the following day, Patient A still had not started bleeding so Respondent advised her to take four more pills vaginally.

47. On Sunday, she still had not started bleeding so she took another four pills orally. Later in the day, Patient A met Respondent and they went for a walk. While they were walking she began bleeding. The bleeding lasted several weeks and eventually Patient A developed a uterine infection. Respondent brought her over antibiotics in an unlabeled pill bottle. He did not tell her what kind of antibiotics he was giving her or where he obtained the medication. Respondent did not document providing antibiotics to Patient A in her medical record.

48. On or about February 27, 2014, Patient A had a third HCG blood test which showed she was no longer pregnant.

49. The following weekend Respondent and Patient A had a pre-planned vacation to the same hotel where they first began their relationship back in October 2013. Respondent admitted that he panicked when Patient A told him she was pregnant and that he would spend the rest of his life making it up to her. Respondent thought it would be healing for her if they had a baby together once they got married. Patient A realized that things had changed in their relationship

[10] During a subsequent investigation by Kaiser, Respondent told his employer that he wrote the misoprostol prescription in early February 2014.

and she was no longer happy seeing Respondent. She began a cycle where she would try to break up with Respondent every few days but Respondent would always say that he would not be able to work with her if they no longer dated. Patient A felt that Respondent would try to have her terminated from Kaiser if she broke off their relationship with him.

50. On or about March 3, 2014, Patient A had a new IUD inserted at Kaiser. According to the medical records, Patient A indicated that her prior IUD came out prior to her pregnancy or at the time of the miscarriage in February.

51. On or about May 11, 2014, Mother's Day, Patient A began to have trouble sleeping and suffering from panic attacks. She wanted to leave Labor and Delivery because she started seeing pregnant patients with due dates in November, which is when she would have been due. Respondent refused to talk about the pregnancy. Around that time, Respondent's wife discovered text messages between Respondent and Patient A.

52. On or about June 5, 2014, Patient A finally ended the relationship with Respondent. She told Respondent to take whatever time he needed to figure out things with his wife and children. During this conversation, Respondent made some comment about Human Resources wanting to meet with her.

53. On or about June 6, 2014, Patient A's nursing supervisor contacted her to bring her union representative with her for a meeting with Human Resources.

54. On or about June 10, 2014, Patient A reported the relationship with Respondent to a physician at Kaiser who was providing her treatment for anxiety and insomnia.

55. On or about June 12, 2014, Patient A filed a complaint with Kaiser Permanente's corporate office as a patient against Respondent.

56. Respondent is guilty of unprofessional conduct and subject to disciplinary action under sections 2234 [unprofessional conduct], and/or 2234(b) [gross negligence], and/or 2234(c) [repeated negligent acts], and/or 2234(d) [incompetence] including, but not limited to the following:

a. Respondent engaged in a sexual relationship with Patient A who was under his care and treatment for "Bereavement Counseling" and to whom he prescribed controlled substances.

b. Respondent terminated Patient A as a patient in order to engage in a sexual relationship with the patient.

c. Respondent continued to provide medical care to Patient A after the professional relationship formally ended by prescribing misoprostol and antibiotics to Patient A.

d. Respondent prescribed misoprostol, including predating the prescription, to Patient A in order to induce an abortion.

e. Respondent provided "Bereavement Counseling" to Patient A, a service that was outside the scope of his knowledge and practice as an obstetrician/gynecologist. He further discouraged Patient A from obtaining mental health counseling from qualified personnel, and urged her to continue treatment with him.

f. Respondent's statement that he had no knowledge about misoprostol's alternate uses for obstetrics and gynecology indicates incompetence.

SECOND CAUSE FOR DISCIPLINE

(Sexual Misconduct/Sexual Exploitation)

57. The allegations of Paragraphs 9 through 56, above, are herein incorporated by reference as if fully set forth below.

58. Respondent is subject to disciplinary action for sexual misconduct [726] and/or sexual exploitation [729] based on the sexual relationship he had with Patient A.

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Medical Board of California issue a decision:

1. Revoking or suspending Physician's and Surgeon's Certificate Number A71262, issued to Austin Merritt Kooba, M.D.;

2. Revoking, suspending or denying approval of Austin Merritt Kooba, M.D.'s authority to supervise physician assistants, pursuant to section 3527 of the Code;

3. Ordering Austin Merritt Kooba, M.D., if placed on probation, to pay the Board the costs of probation monitoring; and

4. Taking such other and further action as deemed necessary and proper.

DATED: December 7, 2016

KIMBERLY KIRCHMEYER
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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